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No. 88-1872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CYNTHIA RUTAN, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF OF INDEPENDENT VOTERS OF ILLINOIS-INDEPENDENT PRECINCT ORGANIZATION, BETTER GOVERNMENT ASSOCIATION AND MICHAEL L. SHAKMAN, AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Independent Voters of Illinois-Independent Precinct Organization, Better Government Association and Michael L. Shakman respectfully move for leave to file the accompanying Brief Amici Curiae in support of the Petition for a Writ of Certiorari in this case. Written consent to the filing of the Brief has been obtained from the petitioners and from respondent governmental officials, including the Governor of the State of Illinois. Consents have not, however, been obtained from respondent The Republican Party of Illinois and its officials. This Motion is filed within the time allowed for the filing of the Brief in Opposition.

Independent Voters of Illinois-Independent Precinct Organization is an organization of voters which is active in endorsing and supporting candidates for public office, both in party primary and general elections. Better Government Association is a citizens' organization which promotes efficiency in governmental services and the fairness of the political process in Illinois. Michael L. Shakman is an Illinois voter and a member of Independent Voters of Illinois-Independent Precinct Organization. He has been a candidate for public office. *Amici* have an interest in maintaining a free, fair electoral system. They also have an interest in maintaining freedom of political association; this is especially the case for Independent Voters of Illinois-Independent Precinct Organization, a voluntary political organization whose existence and vitality depend on that freedom of political association.

In this case, the Court of Appeals for the Seventh Circuit has held that virtually every term and aspect of public employment, other than discharge, including hiring, salaries, promotions, demotions, transfers and the like, can constitutionally be conditioned on support of an officially favored political party. This was held to be the case not just for policy-making employees, but for all government workers.

Amici are concerned that this system, by which important terms of employment are conditioned on support of a favored political organization, is inconsistent with their interests in maintaining freedom of political association. As was recognized in *Elrod v. Burns*, 427 U.S. 347, 356 (1976):

> Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, as well as the multitude seeking jobs.

Amici are also concerned that the effect of a politically conditioned employment system is inconsistent with their interests in a free and fair political process. Indeed, the whole point of such an employment system is for the coercive power of the state to be used to provide an electoral advantage for a favored political organization. As the Court noted in *Branti v. Finkel*, 445 U.S. 507, 513-14 n.8 (1980):

> [A] patronage system may affect freedom of belief more indirectly, by distorting the electoral process.

The Petition for a Writ of Certiorari has, understandably, presented the case from the point of view of the serious impact which the practices in issue have on the First Amendment rights of public employees and job applicants. The proposed Brief *Amici Curiae* submits that the case is also important for review because of the impact which the practices in issue have on the rights of voters to a free and fair electoral system. This is a point on which the Petition does not focus.

Respectfully submitted,

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INTERESTS OF THE AMICI

This case concerns the constitutionality of the practice by which important terms and aspects of public employment, other than discharge, are conditioned on support of an officially favored political party. *Amici* are concerned with the harmful and unconstitutional effects such a politically conditioned employment system has on the functioning of the democratic political process, both by impairing the rights of the public to freedom of political association and in distorting the electoral process.

Independent Voters of Illinois-Independent Precinct Organization is an organization of voters which is active in endorsing and supporting candidates for public office, both in party primary and general elections. Better Government Association is a citizens' organization which promotes efficiency in government services and the fairness of the political process in Illinois. Michael L. Shakman is an Illinois voter and member of Independent Voters of Illinois-Independent Precinct Organization who has been a candidate for public office. Each of the *amici* has an interest in promoting a free and fair electoral system. Each also have an interest in maintaining freedom of political association; this is especially so for Independent Voters of Illinois-Independent Precinct Organization, a voluntary political organization whose existence and vitality depend on that freedom of political association.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Seventh Circuit, sitting *en banc*, has held that the Constitution permits the state to condition virtually every term or aspect of public employment, other than discharge, on support of a single officially favored political party. Under its decision, salary levels, promotions, demotions, transfers and similar material terms of public employment, as well as the opportunity to be hired at all, can be so conditioned so long as an employee is not actually or "constructively" discharged.

Amici submit that the decision of the Seventh Circuit is an important one for review. This Court has, in *Branti v. Finkel*, 445 U.S. 507 (1980), and *Elrod v. Burns*, 427 U.S. 347 (1976), held that the political firings are unconstitutional, but it has not specifically decided the question whether other important terms of public employment can be politically conditioned.

The issue is of substantial public significance. Not only are the First Amendment rights of millions of government employees at issue, the practices upheld by the Court of Appeals can significantly impair the freedom of political association of voters generally. And where, as here, the system by which jobs are politically conditioned is extensive, the electoral scales are designed to be tilted, denying voters a right to a free and fair electoral process.

The decision of the Court of Appeals here is, moreover, in sharp conflict with decisions of the other circuits which have held that public employment cannot be so conditioned on political affiliation and support. This conflict of circuits emphasizes the appropriateness of the case for review.

I.

THE QUESTION WHETHER IMPORTANT ASPECTS OF PUBLIC EMPLOYMENT CAN BE CONDITIONED ON POLITICAL AFFILIATION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. This Court's Decisions Have Strongly Suggested, But Not Explicitly Held, That Important Terms Of Public Employment, Other Than Discharge, Cannot Be Politically Conditioned.

In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court held that the First Amendment forbids the state from firing employees because of their political affiliation. This holding was confirmed in *Branti v. Finkel*, 445 U.S. 507 (1980), in which it was held that the Constitution similarly forbids the state to fire employees in order to accommodate politically motivated hirings of replacement workers.

The opinions in both *Elrod* and *Branti* strongly indicate that the Constitution would also bar the state from conditioning other important public employment decisions—hiring, promotions, job discipline and the like—on political affiliation. For example, in *Branti* the Court's opinion states that "it is difficult to formulate any justification for tying *either the selection or retention* of an assistant public defender to his party affiliation." 445 U.S. at 520 n.14 (emphasis supplied). This was not a casual remark. The dissent in *Branti* cited this statement in concluding that the decision "further limits the release of political affiliations to the *selection* and retention of public employees." 445 U.S. at 521 (emphasis supplied). Also at 522 n.2. The plurality opinion in *Elrod* similarly suggests that conditioning other employment decisions such as patronage *hiring* is constitutionally suspect. *Elrod*, 427 U.S. at 336, 369-70.

While *Branti* and *Elrod* are highly suggestive that political conditioning of important terms of employment other than firings similarly would abridge constitutional rights, the holdings in those cases dealt with political discharges. This Court has not explicitly ruled on whether the Constitution bars other important terms of public employment from being politically conditioned.[1]

[1] This Court has on numerous occasions, however, remarked that the hiring of public employees cannot constitutionally be conditioned on party affiliation. In *Branti*, 445 U.S. at 515 n.10, the Court noted:

> "The Court recognized in *United Public Workers v. Mitchell*, 330 U.S. 75, 100, [91 L Ed 754, 67 S Ct 556] (1947), that 'Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office . . ."' This principle was reaffirmed in *Wieman v. Updegraff*, 344

(Footnote continued on following page)

The factual setting in which the present case arises squarely presents that issue. Important employment decisions, including hiring, salary levels, promotions and transfers, were alleged to be conditioned on political party affiliation. Politics was not just taken into account in the employment decisions in issue. It was the reason Cynthia Rutan did not receive the raise she had earned and otherwise would have received. It was the reason Franklin Taylor was kept from getting jobs for which he otherwise would have been hired.[2]

Indeed, the factual setting here makes the case particularly appropriate for review. The employment decisions involved here were neither *ad hoc* in nature nor isolated instances of errant judgment. To the contrary, the complaint alleges that a formalized state system, adopted by means of a gubernatorial executive order, conditioned thousands of nominally civil service jobs with the State of Illinois on political affiliation. And the complaint alleges that the system was so extensive as to give the favored

[1] *continued*

> U.S. 183, [97 L Ed 216, 73 S Ct 215] (1952), which held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. And in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898, [6 L Ed 2d 1230, 81 S Ct 1743] (1961), the Court recognized again that the government could not deny employment because of previous membership in a particular party." Id., at 357-358, 49 L Ed 2d 547, 96 S Ct 2673."

[2] While the case was remanded on petitioners' claims relating to actual or constructive discharge, the decision of the Court of Appeals is final as to the claims of Mr. Taylor that he was kept from being hired for political reasons and as to the claims of the other petitioners that their constitutional rights were abridged by the denials for political reasons of their raises, promotions and transfers.

party a significant electoral advantage over other political groups.

B. The Case Raises Very Important Issues Both With Regard To First Amendment Rights Of Employees And With Regard To Rights Of Voters To A Free And Fair Political Process.

The issues in this case are important in two principal respects. Conditioning important job decisions on political affiliation and support plainly impairs the First Amendment rights of affected employees and applicants. And such a politically conditioned employment system seriously affects the rights of the community generally to freedom of political association and a fair election process.

1. The First Amendment Rights Of Public Employees And Applicants Are Seriously Impaired When Important Terms Of Employment Are Conditioned On Support Of An Officially Favored Political Party.

The practices in issue here seriously undermine the freedom of political association of public employees and applicants. Freedom of political association is inconsistent with the conditioning of important terms of one's employment on political affiliation. If your salary level depends on your continued support of a favored political organization, it is a fiction to say you have freedom of political association. If you can be demoted, or if you can be denied a promotion that you have earned, solely because of your political affiliation, you do not have freedom of political association. If you are denied the opportunity even to be considered for a job for which you are well qualified simply because you do not contribute money to a particular party committee, you do not have freedom of political association in any material way.

Jobs are important to people. Not only are they a livelihood, significant as that is, they provide a central element of self-worth. Conditioning job decisions and opportunities on politics accordingly is one of the most effective ways by which the state can chill rights of political speech and association. This was graphically illustrated by a recent report from China in the New York Times:

> "Everybody in Shanghai sympathizes with the students," said one bystander who identified himself as a computer engineer. "But they don't dare march because they are afraid of retaliation at their work site." The engineer said that workers had been worried that they could lose their salaries and possibly even their jobs if they took part in demonstrations.

New York Times, June 10, 1989 at 7 col. 1.

The issues raised in this case thus involve very important rights for public employees, who constitute a significant portion of the national work force. And the practices in issue here are not unique to this specific factual setting. Public employees and applicants across the country are subject to similar impairments of their rights of political association.

The decision of the Seventh Circuit would, moreover, severely undercut the holdings of *Branti* and *Elrod* that public employees may not be coerced through control over their employment into support of a favored political party. Where an employee's salary level, or her ability to get a promotion, or his potential of being demoted, rest on his or her political support (money and work), the employee is plainly subject to political coercion, barred by *Branti* and *Elrod*. A regime as allowed by the Seventh Circuit would re-indenture public employees to political masters.

In short, it is very difficult to draw either a constitutional distinction or much of a practical difference between basing firing decisions on political affiliation and conditioning other important job decisions on party affiliation. In either instance, the First Amendment rights of employees and employers are impaired.[3]

It is significant to note in this regard that Judge Manion's opinion for the Seventh Circuit does not deny that First Amendment rights of employees and applicants are impaired by the practices in issue. Rather, it concludes that no constitutional claim is presented, in part because that impairment is outweighed by the public benefit which a political employment system is said to provide. In this regard, the decision of the Court of Appeals runs plainly contrary to the analysis applied by this Court in *Branti* and *Elrod*. Indeed, the opinion in essence adopts the analysis of the dissent in *Branti* rather than the opinion of this Court. This further suggests the appropriateness of the case for review.

[3] Numerous law review articles have concluded that the principles in *Elrod* and *Branti* necessarily apply as well in the context of politically conditioned hiring and other job decisions. *See, e.g.*, Comment, *Patronage and the First Amendment After Elrod v. Burns*, 78 COLUM. L. REV. 468, 476 (1978) ("Patronage hiring skews the electoral process by encouraging job applicants to affiliate with the incumbent party"); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 195 (1976) ("[I]n the hiring context, every applicant for every job is subject to such coercion"); Comment, *First Amendment Limitations on Patronage Employment Practices*, 49 U. CHI. L. REV. 181, 200 (1982); Note, 29 EMORY L.J. 1217 (1980); Comment, *Republicans Only Need Apply: Patronage Hiring and The First Amendment in Avery v. Jennings*, 71 MINN. L. REV. 1374 (1987).

2. A Politically Conditioned Employment System Impairs The Rights Of The Public To A Free And Fair Political System.

The practices in issue also raises an important question for review by this Court, *amici* submit, because of the impact of those practices on the political process generally.

First of all, the rights of voters generally to freedom of association are impaired. Conditioning jobs on support of one political organization necessarily injures the ability of competing political groups and their members to attract support, both among existing public employees and among those who wish to keep open the possibility of seeking employment. Where, as here, the political employment system is extensive and thousands of jobs are involved, the impact on the public's freedom of association is significant. Many, perhaps most, people will avoid openly supporting competing political groups if it means a significant disadvantage to their careers or a loss of employment opportunity.

This impact in terms of determining support of competing political groups was clearly recognized by the plurality opinion in *Elrod*:

> Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, as well as the multitude seeking jobs.
>
> . . . .
>
> . . . Patronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government.

427 U.S. at 356, 369-70 (emphasis supplied). These observations are relevant, it is submitted, whenever significant terms of employment are politically conditioned.

Moreover, a politically conditioned employment system is inconsistent with the interests of voters to a free and fair electoral process. The effect of such a system is to use the coercive power of the state to produce money and support for the favored political organization as a price for favorable job decisions. Where, as here, such practices are extensive, they operate to tilt the electoral scales by providing electioneering support solely for a state-favored party. This is the whole point of the system—to give the favored party an electoral advantage. As the plurality opinion in *Elrod* observed:

> It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers. . . . Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant.
>
> . . . .
>
> . . . Patronage can result in the entrenchment of one or a few parties to the exclusion of others.

427 U.S. at 356, 369.

This point in *Elrod* was also recognized in the Court's opinion in *Branti*: "[A] patronage system may affect freedom of belief more indirectly, by distorting the electoral process." 445 U.S. at 513-14 n.8.

The present case is thus particularly important for review because the political employment system in issue here tends to undermine the whole democratic process, chilling support for competing political organizations and using coercive state power to give a discriminatory advantage to a favored political group.

3. Rights Of Minorities Are Especially Impacted By Politically Conditioned Hiring.

The case is further important for review because the rights of minorities are especially impacted by politically conditioned hiring. Public jobs are particularly important to minorities whose job opportunities may otherwise be limited. If hiring depends on party affiliation, minorities face a Hobson's choice of political freedom or economic well-being.

Moreover, race is a very significant factor in political party affiliation. Where jobs depend on political affiliation, minorities are out of luck as far as jobs are concerned in offices held by a party which does not represent their interests.

II.

THE DECISION OF THE SEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE OTHER CIRCUITS.

The decision of the Seventh Circuit is, as it acknowledges, in direct conflict with the decisions of other Courts of Appeals. Contrary to the decision of the Seventh Circuit in the present case, the majority of the Courts of Appeals which have considered the issue have held that the First Amendment rights of public employees are abridged when important terms of employment are conditioned on political affiliation. See, for example, *Lieberman v. Reisman*, 857 F.2d 896, 900 (2d Cir. 1988) ("Whenever under color of state law unfavorable action is taken against a person on account of that person's political activities or affiliation, it raises First Amendment concerns."); *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987); *Robb v. City of Philadelphia*, 733 F.2d 286 (3d Cir. 1984) (an allegation

that a failure to promote an employee because of his exercise of First Amendment rights held to state a claim).

Moreover, the decision of the Seventh Circuit is in conflict with the decisions of a number of the other circuits on the constitutionality of political hiring. In *Avery v. Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 106 S. Ct. 3276 (1986), the Sixth Circuit stated that if hiring were based solely on politics, it would be unconstitutional. In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the D.C. Circuit held it to be unconstitutional to deny an applicant employment because of his party affiliation. See also *Rosenthal v. Rizzo*, 555 F.2d 390, 392 (3d Cir.) *cert. denied*, 434 U.S. 892 (1977) ("a state may not condition hiring or discharge of an employee in a way which infringes his right of political association"); and *Cullen v. New York State Civil Service Comm.*, 435 F.Supp 546 (E.D. N.Y.), *appeal denied*, 566 F.2d 846 (2d Cir. 1977) (conditioning hiring and promotion on campaign contributions held unconstitutional).

Given the importance of the issues, resolving the plain conflict among the circuits is especially necessary.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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